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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 49

HYMAN SCHER, ALIAS WILLIAM SCHER, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the trial court on the motion to suppress evidence appears at R. 7–9. The per curiam opinion of the Circuit Court of Appeals (R. 75–77) is reported at 95 F. (2d) 64.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 18, 1938 (R. 75),[1] and a

[1] It should be observed that the notice of appeal contained in the transcript relates to the judgment rendered by the District Court at a prior trial and not to its judgment in the present case (R. 13). However, this was apparently an error in making up the transcript, and the Government has not and does not now raise any objection based on this situation.

petition for rehearing denied on April 13, 1938 (R. 77). An order amending the opinion was filed on the same day (R. 77). The petition for a writ of certiorari was filed on May 18, 1938, and granted on May 31, 1938 (R. 78). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

(1) Whether the search of the petitioner's automobile and the seizure of the non-tax paid liquor contained therein was illegal under the circumstances of this case, and whether his motion to suppress the evidence thus obtained was properly overruled.

(2) Whether the trial court properly sustained the objection of the Government to the question addressed to a law enforcement officer on cross-examination requiring him to reveal the name of his confidential informer.

STATUTE INVOLVED

Section 201, Title II, of the Liquor Taxing Act of January 11, 1934, c. 1, 48 Stat. 313, 316 (U. S. C., Title 26, Sec. 1152a), provides, in part, as follows:

> No person shall * * *. transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the

quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

* * * * *

(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; * * *.

Section 207, Title II, of the Liquor Taxing Act of 1934, c. 1, 48 Stat. 317 (U. S. C., Title 26, Sec. 1152 g, so far as pertinent, provides:

Any person who violates any provision of this title, * * * shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both. * * *

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts charging him, respectively, with "knowingly,[2] wilfully, feloniously, and unlawfully" possessing and transporting in a certain automobile 24 quarts of gin and 13⅓ gallons of whiskey, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed thereon, in violation of the Liquor Taxing Act of 1934, *supra* (R. 2–3).

[2] In charging that the petitioner "knowingly" possessed and transported the liquor in question, the indictment went farther than the specific language of the statute, the word "knowingly" not being contained therein.

Before trial petitioner filed a motion to suppress evidence obtained by a search of his automobile and the seizure of the liquor found therein, claiming that the search and seizure were illegal (R. 4–7). This motion sought also a return of all articles seized as a result of the search. The motion was overruled by the District Court and an exception was noted (R. 7–9, 11, 27). The case then proceeded to trial (R. 27). The motion to suppress evidence was not renewed at the trial nor was any objection interposed to the introduction of testimony relating to the search and seizure on the ground that they were illegal. At the close of the Government's case the petitioner made a motion for a directed verdict, which was overruled. An exception was preserved (R. 36–37). This motion was not renewed at the end of the whole case (R. 51). Petitioner was convicted on both counts (R. 10–11, 58) and sentenced to imprisonment for a year and a day and a fine of $500 and costs (R. 11). A motion for a new trial was overruled (R. 12–13).

The judgment was affirmed by the Circuit Court of Appeals for the Sixth Circuit in a per curiam opinion and a petition for rehearing denied (R. 75–77).

At the hearing on the motion to suppress evidence the petitioner testified in support of his application (R. 19–24). The petitioner then called Investigator Bowes of the Alcohol Tax Unit as his witness (R. 24–27). In order to give a better picture

of the chronology of events, Investigator Bowes' testimony will be summarized first. It was substantially as follows:

He and other officers received information, from a source which had theretofore been found reliable, that the so-called Carr-Burke-Rosenthal gang was operating from headquarters at 10838 Drexel Avenue, Cleveland, Ohio; that it was "putting out" the same kind of "phony" whiskey as it had elsewhere;[3] and that about midnight on December 30, 1935, a load of this whiskey would be taken from the above premises in a Dodge car, license No. LX 418.[4] The officers posted themselves "in" (apparently near) the premises, which comprised a private dwelling, and at about 9:30 p. m. observed the arrival of the above-mentioned car. It remained there about an hour, when a man resembling the petitioner, accompanied by three women, came out of the house. The man carried a package of the same size and shape as those which were later seized and contained whiskey. They entered

[3] From the testimony of Alcohol Tax Unit Investigator Williamson at the trial, who appears to have been the first to receive the information, it is not clear whether he was advised that the liquor was "phony" or "tax unpaid," but in either event it is clear that he understood that the internal revenue taxes had not been paid on the liquor (R. 31).

[4] No attempt was made by the petitioner in any way to question the reliability of the information upon which the officers acted, at the hearing on the motion to suppress evidence. Indeed, this information was brought out by the petitioner himself in making the officer his own witness.

the car and drove away. The car returned at about midnight. While previously it had been parked in the street, on this occasion it was parked near one of the rear corners of the house, near the door which led to the basement. The headlights were extinguished and the car remained there about half an hour.

It was agreed at the hearing that Officer Williamson, who accompanied Officer Bowes and made some observations not seen nor heard by the latter, would testify, if present, as follows:

> I heard something heavy set down, like wood, and heard it slide, like it was heavy paper, across a wooden surface, and I heard the house door slam, the trunk slam, and the door of the car slam.*

(The cases of liquor later seized contained six bottles to the case, were wrapped in very heavy brown wrapping paper with at least two wrappings and with a heavy cord around them cross-wise so that they could readily be lifted.)

The testimony of Bowes continued to the effect that the car left about 12:30 a. m. with the petitioner as the only occupant. It appeared to be loaded more heavily than on the previous trip, although on that occasion it carried three passengers in addition to the driver. The two officers fol-

* This agreement was made in connection with a further agreement that if Officer Williamson, an investigator of the Alcohol Tax Unit, were present at the hearing, he would give the same testimony as Officer Bowes (R. 26).

lowed the petitioner's car in a Government automobile for two or three blocks, when the former stopped at a gasoline station. The driver alighted, crossed the street and returned with a newspaper. The car then proceeded for two or three blocks, with the officers following. As the latter were "closing up close" the petitioner's car turned into a driveway and was driven into the garage at the petitioner's home at 10025 Olivet Avenue. The officers were unable to stop their car immediately because the streets were slippery. Invsetigator Bowes left the Government car as soon as it could be stopped and followed the petitioner's car on foot to the garage. The garage door was open and the headlights of the petitioner's car were still burning. The petitioner had just alighted and walked to the back door of the garage. The officer, who had his badge and flashlight, said: "I am a Federal officer, I have a tip that this car is hauling bootleg liquor." The petitioner said: "Just a little for a party." The officer asked, "Is it tax paid?" Petitioner replied, "It is Canadian whiskey." The officer asked "Is it in there?" and petitioner said, "It is." The officer then opened the trunk in the rear of the car and found 14 packages, containing 88 bottles of non-tax paid liquor. Two bottles were found near the driver's seat. Petitioner was placed under arrest, and the car and liquor were seized.

At the hearing on the motion, petitioner testifield, among other things, in regard to his arrest

and the search and seizure. He also testified, in effect, that the garage in which his automobile was standing when searched was located about six feet away from the two-family house, the second floor of which was occupied by himself and members of his family; and that the building was not used for any kind of business. He admitted that he bought the liquor in question at the Drexel Avenue address, a private residence, from a man named Carr and paid $145 for it. He stated that he went to the Drexel Avenue house following a conversation had earlier in the day with a stranger who came to the store where the petitioner was employed and told him that he could get liquor there. The stranger called Carr on the telephone and told the latter that he was sending petitioner out. Petitioner first called at the Drexel Avenue house at about 9:30 p. m. and bought one case of liquor which he took to his brother's home. With reference to the seven cases of liquor which he purchased from Carr at midnight, petitioner testified that he could not see whether the liquor was tax-paid because it came in packages and was loaded into his car while he was in Carr's house, and that as to the case opened at his brother's house he paid no attention as to whether the liquor had stamps on it or not. He also testified that he did not have the liquor for sale (R. 19–24).

After the motion to suppress the evidence was overruled, the case came on for trial. The Govern-

ment called Investigator Williamson in addition to Investigator Bowes, who had testified at the hearing on the motion. Williamson's testimony substantially corroborated Bowes, who at the trial repeated, in effect, the testimony he had given at the prior hearing (R. 31 *et seq.*).* They both testified at the trial to the discovery of the liquor in the petitioner's automobile and the surrounding circumstances. No objection to this testimony was interposed by the petitioner on the ground of any alleged illegality of the search. The liquor itself was not offered in evidence.

Petitioner, in testifying at the trial in his own behalf, admitted that he had purchased, possessed and transported the liquor in question (R. 48), but by his own testimony and that of various relatives, attempted to bring the case within the provision of Section 201, Title II, of the Liquor Taxing Act of 1934, which excepts "Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale". He stated that he did not buy the liquor for the last-mentioned purposes (R. 49). He and several members of his family testified that they gave extensive entertainments, at which large quantities of liquor were consumed (R. 37–41, 41–47, 48–49). He

* In testifying as to the 88 bottles of liquor which were seized, Investigator Bowes stated that "There were 36 bottles of those imitation Holland gin in a sort of jug-bottle. * * * I don't recall the exact number. There were some imitation Vat 69 and some imitation of White Horse Scotch whiskey. I believe there were two other types of bottles, the brand names I don't recall." (R. 33.)

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stated that on the evening of the day on which he was arrested (New Year's Eve) there were as many as 75 or 100 people at his home (R. 50). It appeared, however, that he, his father, his mother, his two brothers, his sister and a sister-in-law all lived together and that his drawing account was only $25 to $30 a week (R. 37, 38, 51).

On cross-examination, the petitioner also testified that he did not know that taxes on the liquor in question had not been paid; that he was told that it was Canadian bonded liquor, which to him meant "good" liquor (R. 49-51).

In submitting the case to the jury, the District Judge pointed out that the petitioner admitted and the evidence showed that petitioner possessed and transported the liquor named in the indictment; and that it appeared that the bottles did not bear the stamps required by law. The Judge left two questions for the jury: (1) whether the petitioner knew before the officers searched his car that the bottles were unstamped, and (2) whether he had by a fair preponderance of the evidence established his defense that the liquor was not bought for sale or for use in manufacturing or producing articles intended for sale (R. 52, 55).

Investigator Williamson testified in behalf of the Government at the trial that on December 30, 1935, he saw the petitioner and three women come out of a house on Drexel Avenue, enter a green Dodge sedan and drive away. He continued (R. 28):

> Q. What was the reason for your going out there in this vicinity? A. I received

reliable information from a confidential informer that a certain 1935 Dodge sedan, license LX-418——

Mr. DOYLE [counsel for petitioner]: I object to the answer, and ask that it be stricken on the ground it is hearsay, and information obtained or statements made not in the presence of the defendant.

The COURT: You may save the point.[1]

Mr. DOYLE: Exception.

Q. Proceed. A. That a load of tax unpaid distilled spirits in bottles would be taken from this address or would be taken from a house on Drexel Avenue at about 12:30 a. m.

On cross-examination Williamson testified that his confidential information was reliable. He was then asked by defense counsel whether he had received any other information at any time since December 31, 1935, which he considered reliable concerning the petitioner's actions. He replied in the negative. Objections by the Government were then sustained to the following questions by petitioner's counsel (R. 29):

Q. Did you receive any information which you considered reliable concerning his actions in Charleston, West Virginia?

Mr. SCOTT [Govt. counsel]: I object, your Honor.

The COURT: Objection sustained.

Mr. DOYLE: Exception.

[1] This point was not raised by the assignments of error contained in the petition for writ of certiorari (pp. 6–9).

Q. Have you at any time received any information concerning Scher which you considered reliable information and later turned out to be unreliable, false and perjurious?

Mr. SCOTT: I object.

The COURT: Objection sustained.

Mr. DOYLE: Exception.

When Investigator Bowes, who also testified for the Government, was cross-examined by the petitioner's counsel, he testified that he had received confidential information that "phony" liquor would be hauled away from the Drexel Avenue premises in petitioner's car. The following question was then asked by petitioner's counsel and the following colloquy ensued (R. 34–35):

Q. Mr. Bowes, will you tell us the name of your confidential informer?

Mr. SCOTT: I object.

The COURT: Objection sustained.

Mr. DOYLE: May I be heard on that?

The COURT: No, sir. I will not hear you. That has been too often decided. I have decided it, as you know, and many other courts have decided that question should not be answered. I shall not re-examine the question. I have examined it again within the last 48 hours.

Mr. DOYLE: May I dictate my offer?

The COURT: Certainly.

Mr. DOYLE: The defendant proposes to show by this line of cross examination that the witness received information which he considered reliable at the former trial by pro-

ducing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable.

In concluding his cross-examination of Investigator Williamson, petitioner's counsel brought out that after the first trial of the petitioner on the present indictment the officer further investigated the petitioner's activities and to that end proceeded to Charleston, West Virginia. The officer was then asked, "And did you procure some information which you considered reliable and confidential concerning Scher's activities?", to which an objection by the Government was sustained and an exception noted (R. 36).

SUMMARY OF ARGUMENT

I. The motion to suppress was properly overruled. (a) The search was of the petitioner's automobile and not of his garage and hence was valid without a search warrant, since it was made on probable cause. Considering the confidential information received by the officers, the verification of this information in numerous particulars by subsequent events, and especially the admissions made by the petitioner at the garage, there were reasonable grounds for the search. The trailing of the car on the street by the officers and the search was one continuous and uninterrupted process.

An automobile which the officers have reasonable cause to believe is carrying contraband and which they have trailed cannot, we submit, secure immunity by being driven into a private garage. (b) Moreover, the search was incidental to or contemporaneous with a lawful arrest and as such was validly made without a warrant. There was sufficient probable cause to justify the arrest, and since the arrest and the search were a part of one continuous transaction, it is immaterial that the search preceded the arrest.

II. The court did not err at the trial in excluding on cross-examination questions designed to elicit the identity of the officers' confidential informer. The rule is that the source of confidential information received by law enforcement officers need not be revealed. Some decisions suggest an exception when a disclosure is necessary either to establish the innocence of a defendant or otherwise to permit the proper disposition of the issues of a particular case. In the instant case the Government is not compelled to rely upon the confidential information to sustain the validity of the search and seizure. There consequently was no occasion for the application of any exception, if one exists, to the general rule. Moreover, the petitioner does not contend that the identity of the informer had any bearing on the question of guilt or upon any issue other than that of probable cause. That issue had been concluded prior to the trial.

ARGUMENT

I

THE SEARCH AND SEIZURE WERE VALID AND HENCE THE MOTION TO SUPPRESS THE EVIDENCE OBTAINED THEREBY WAS PROPERLY OVERRULED

In support of his contention that the motion to suppress should have been granted, petitioner argues that the search and seizure violated his constitutional rights in that the officers did not have probable cause to believe that he possessed and was transporting liquor on which the tax had not been paid. He also contends that the search of the automobile constituted a search of the garage and that, since the garage was within the curtilage of his home, it could not be searched without a warrant. We submit that the contentions are without merit.

It is at least debatable that the petitioner's failure to renew his objection at the trial, is a waiver of his rights. See *Cogen* v. *United States,* 278 U. S. 221, 224. We shall nevertheless present the question on the merits. By so doing, however, we do not wish to be understood as consenting that this defect be overlooked.

A. THE SEARCH SHOULD NOT BE DEEMED A SEARCH OF THE DWELLING, BUT OF THE AUTOMOBILE, AND HENCE COULD HAVE BEEN VALIDLY MADE ON PROBABLE CAUSE WITHOUT A SEARCH WARRANT

It is fundamental that the Fourth Amendment does not proscribe all searches and seizures without a search warrant, but only such as (1) are unrea-

sonable, and (2) are directed principally against the home or the person. *Carroll* v. *United States*, 267 U. S. 132, 147; *United States* v. *Lefkowitz*, 285 U. S. 452, 464.*

It is likewise well established that the prohibition against search of a dwelling without a warrant does not include searches of vehicles made upon probable cause. *Carroll* v. *United States*, 267 U. S. 132; *Husty* v. *United States*, 282 U. S. 694; *Rodriguez* v. *United States*, 80 F. (2d) 646 (C. C. A. 5th). Searches of ships, for example, for smuggled goods have always been permitted without a search warrant. Act of July 31, 1789, Sec. 24, c. 5, 1 Stat. 29, 43.

In the case at bar the officers were following the petitioner's automobile. Had they stopped the car and searched it prior to its being driven into the garage, no search warrant would have been requisite since they had probable cause. Upon observing the petitioner's car turn into the driveway leading to his garage, the officers stopped their car and one of them immediately jumped out and followed on foot, without losing sight of the petitioner's vehicle. In other words the search was the continuation and culmination of the action of the

* This Court has indicated that in revenue cases a broader scope will be accorded to the right of search and seizure than in non-revenue cases. *Boyd* v. *United States*, 116 U. S. 616, 623; *Carroll* v. *United States*, 267 U. S. 132, 149. These and other cases also indicate that the constitutional protection is to be strictly enforced to protect a person's private papers from a comprehensive search and seizure but that the rule may be somewhat relaxed when contraband articles are seized. *Weeks* v. *United States*, 232 U. S. 383.

officers in following the car with the evident intent of eventually arresting the occupant. Surely, the petitioner could not cut off the right of search by suddenly driving the automobile into the garage. Substantial rights cannot be made to depend on such minute refinements. Moreover, the archaic forms of the old law of sanctuary constitute no part of the modern law of searches and seizures.

It is clear that the officers had ample probable cause to believe that liquor on which the tax had not been paid was being transported in the petitioner's car. It follows, therefore, that they were justified in making the search.

The testimony of Investigator Bowes, who was called as a witness by the petitioner at the hearing on the motion to suppress, and by whose testimony the petitioner was consequently bound (see, pp. 5–7, *supra*), established that the officers had received confidential information from a source which theretofore they had found reliable that a "bootlegging" gang, which was operating from a private dwelling in Cleveland, Ohio, was selling non-tax-paid liquor at these premises and that a car bearing the license number of petitioner's car would appear at this house at midnight on December 30th for the purpose of taking away a load of such liquor. This information was verified in numerous particulars by subsequent events. The car described by the informant appeared as foretold. It was driven to a rear corner of the house adjacent to the basement door. The lights were turned out. Not long afterward one of the officers heard "something heavy set down, like wood, and heard it slide,

like it was heavy paper, across a wooden surface, and * * * heard the house door slam, the trunk slam, and the door of the car slam." (The cases of liquor later seized were wrapped in heavy paper.) When the officers followed the car they noticed that it was heavier when carrying only one occupant than it had been earlier in the evening when it carried four persons. Bearing in mind the information they had received and the occurrences they had observed, the officers had ample ground to believe that the petitioner was transporting liquor on which the tax had not been paid.

Clearly, it was not incumbent upon the officers to search the petitioner's car immediately upon leaving the bootleg distributing point. They might have believed that delay might develop additional evidence which would aid in securing a conviction of the petitioner or in disclosing possible confederates.

However, assuming that the officers then did not have probable cause, what transpired subsequently did establish probable cause. The petitioner had driven his car into his garage, the headlights were still burning, and the petitioner had walked to the door of the garage. The fair inference from the testimony is that Investigator Bowes, who had followed on foot, met him there. The officer carried his badge and flashlight and advised the petitioner that he was a Federal officer and had a tip "that this car is hauling bootleg liquor." To this petitioner replied, "Just a little for a party." He was then asked whether the liquor was taxpaid. To this query he responded, "It is Canadian whiskey." These answers were clearly sufficient to justify the

officers in believing that the tax had not been paid on the liquor. The petitioner was further asked whether the liquor was "in there" (referring to the trunk), to which he replied in the affirmative. Not until these admissions were made, did the officers search the automobile, seize its contents, and arrest the petitioner. Clearly the responses which the petitioner made to the officers' questions in and of themselves established probable cause.

While the petitioner stated that the bootleg liquor which he had was intended for a "party", the officers had ample grounds for doubting the statement, in view of the peculiar circumstances under which the liquor was acquired, *i. e.*, that a large quantity was obtained at midnight at a private house. Moreover, under the Liquor Taxing Act the possession and transportation of liquor on which no tax had been paid is *prima facie* a violation of the statute. The fact that such liquor may not have been intended for sale or for use in the manufacture or production of any article intended for sale, is an affirmative defense on which the defendant has the burden of proof. (*Queen* v. *United States*, 77 F. (2d) 780 (App. D. C.), certiorari denied, 295 U. S. 755; *United States* v. *Sarro*, 14 F. Supp. 397 (E. D. N. Y.) See the charge to the jury in the instant case (R. 55), to which the petitioner took no specific exception (R. 57)). Consequently the officers were not required to believe in order to establish probable cause, as the petitioner asserts (Br. 18), that the liquor was intended for sale.

We submit that the facts of the present case are stronger than those found sufficient to establish probable cause in *Carroll* v. *United States*, 267 U. S. 132, and *Husty* v. *United States*, 282 U. S. 694. The case of *United States* v. *Kind*, 87 F. (2d) 315 (C. C. A. 2d), on which petitioner principally relies, is distinguished in the opinion of the District Court (R. 7).

In the *Carroll* case the facts leading to the search and seizure were as follows: Government agents made arrangements with the defendants in Grand Rapids, Michigan, to purchase a quantity of liquor, but the liquor was never delivered. The agents, however, made a note of the defendants' car. About a week later, while the agents were patrolling the highway between Detroit, a well-known smuggling area, and Grand Rapids, the automobile passed them. They followed the car but lost it. Two months later, while they were again patrolling the highway, the defendants passed them in the same car. The agents followed and then stopped and searched the car. The search resulted in finding liquor. There was nothing about the appearance of the car to indicate that liquor was being carried. The agents had no information that the car would be passing at that particular time. Nevertheless this Court upheld the search and seizure.

After quoting (p. 161) the following definition of probable cause from *Stacey* v. *Emery*, 97 U. S. 642, 645:

> If the facts and circumstances before the officer are such as to warrant a man of pru-

> dence and caution in believing that the offense has been committed, it is sufficient,

and the following language of Chief Justice Shaw in *Commonwealth* v. *Carey*, 12 Cush. 246, 251:

> * * * if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful,

this Court concluded (p. 162):

> In the light of these authorities, and what is shown by this record, it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.

In recognizing a distinction between a search without a warrant for contraband goods in an automobile which can readily be moved and a search without a warrant for such goods in a permanent structure, this Court said (p. 149):

> On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is,

> upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

And again (p. 153):

> We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

In the *Husty* case, *supra*, the defendant Husty had been known to the officers for a number of years as a bootlegger. On the day of his arrest they received confidential information over the telephone from a reliable source that the defendant had two loads of liquor in automobiles, of a particular make and description, parked in particular places on named streets. Acting on the information the officers found one of the cars described, at the point indicated. Later Husty, his codefendant, and a third man entered the car. Husty had started it when he was stopped by the officers. His

codefendant and the third man fled, the latter escaping. The officers searched the car and found it contained a quantity of liquor. In holding that there was probable cause for the search and seizure without a warrant, this Court said (pp. 700–701):

> The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll* v. *United States*, 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra* v. *United States*, 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra* v. *United States, supra; Stacey* v. *Emery*, 97 U. S. 642, 645.

As was said in the *Husty* case, *supra*, it is not necessary, in order to show probable cause, that the arresting officer should have before him legal evidence of the suspected illegal act. Nor, as was also pointed out in that case (p. 700) and in the *Carroll* case (pp. 158–159), was it necessary that the arrest precede the search.

No part of the garage or the petitioner's home was searched. The only thing searched was the automobile which the officers had followed continuously from the place where the contraband was obtained. As they were about to draw near the petitioner's car, it was driven into a garage. The officer followed on foot. The car had barely come to rest. The lights were still burning and the door of the garage was open. Petitioner had just alighted from the car and met the officer at the door. Thus this is not a case of officers entering a closed garage without a warrant to seize contraband stored inside (Cf. *Taylor* v. *United States*, 286 U. S. 1). The car was under constant surveillance from the time it left with its load. The trailing of the car on the street and the search were one continuous and uninterrupted process. There was no intent or purpose on the part of the officers to search the garage or private dwelling and no such search was made. Certainly it cannot be successfully contended that an automobile which the officers have reasonable cause to believe is carrying contraband and which is being trailed can secure immunity by being driven into a private garage.*

* Some authorities hold that a detached private garage, even though used in connection with a dwelling, is not such a part of the dwelling as is protected by the Fourth Amendment. *Earl* v. *United States*, 4 F. (2d) 532 (C. C. A. 9th); *Gay* v. *United States*, 8 F. (2d) 219 (C. C. A. 9th). It does not appear necessary, however, to argue this point.

B. THE SEARCH WAS INCIDENTAL TO A LAWFUL ARREST, AND AS SUCH COULD BE VALIDLY MADE WITHOUT A WARRANT

It is a well-established principle that contemporaneously with and incidentally to a lawful arrest, the arresting officer may make a search of the prisoner's person and of the premises in which the arrest is consummated. In this instance the arrest was unquestionably lawful. Since the offense of which the petitioner was accused was a felony, the arrest could be made on probable cause without a warrant. Whether the officer first informed the petitioner that he was under arrest and then searched the car, or whether he first looked inside the trunk and then placed the petitioner under arrest, is clearly immaterial. The two acts closely followed one another and were part of the same transaction,—part of the same *res gestae*. Their chronological order is irrelevant. In essence, the search was incidental to and contemporaneous with the arrest, and, therefore, lawful.

Assuming *arguendo*, as the petitioner contends, that the garage was a part of the petitioner's private dwelling and, that a search of the petitioner's automobile within the garage may be considered a search of the garage, we submit, nevertheless that the search and seizure were legal.

In *Agnello* v. *United States*, 269 U. S. 20, 30, it was stated by this Court that:

> The right without a search warrant contemporaneously to search persons lawfully

> arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392.

Similar expressions are also found elsewhere in the *Agnello* opinion (pp. 32, 33).

The following cases hold to the same effect: *Marron* v. *United States*, 275 U. S. 192; *Shelton* v. *United States*, 50 F. (2d) 405 (C. C. A. 7th); *Nordelli* v. *United States*, 24 F. (2d) 665 (C. C. A. 9th); *Cline* v. *United States*, 9 F. (2d) 621 (C. C. A. 9th).

In the instant case, as we have heretofore pointed out, the officers had sufficient grounds to believe that a felony was being committed when petitioner left the bootleg distributing point.[10] They therefore had a right to follow the petitioner to and upon his premises and arrest him for such violation and, contemporaneously therewith or incidental thereto, to search the premises where the arrest occurred. As they had reasonable grounds to believe that the petitioner was committing a felony they were not trespassers on the petitioner's premises.

[10] The Liquor Taxing Act makes the offenses charged in the indictment fellonies (see p. 3, *supra*).

Even if it be assumed that probable cause arose solely as a result of information gained by the officer while he was in the petitioner's driveway,[11] that fact did not invalidate the arrest and search. *Hester* v. *United States*, 265 U. S. 57. There is nothing in the testimony indicating that the driveway was not a driveway open from the street, and the photographs, Exhibit A, introduced in evidence at the hearing on the motion to suppress (R. 19, 24), and which has been filed in this Court pursuant to stipulation of counsel, clearly shows that it was. Under these circumstances, the officers did not invade the privacy of the petitioner's home, even if it be assumed that the garage may be considered a part of his "house" within the meaning of the Fourth Amendment. That Amendment obviously was intended to prevent the invasion, without lawful right, of the privacy of a person's home. Even if the officer committed a trespass it clearly was not one which infringed on such privacy. *Hester* v. *United States, supra.* In that case the officers concealed themselves about fifty to one hundred yards from Hester's house and observed violations of the National Prohibition Act on the defendant's land, on which they later seized a vessel containing liquor. This Court held that the officer's testimony was not

[11] There is nothing in the testimony of Investigator Bowes, who was the petitioner's witness at the hearing upon the motion to suppress evidence, to show that he had entered the garage prior to the entry made in order to search the car (R. 25).

obtained by an illegal search or seizure, even if there had been a trespass. Mr. Justice Holmes said (p. 59):

> The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

While it was held by this Court in *Taylor* v. *United States, supra,* that an officer may not enter a garage adjacent to a private dwelling merely for the purpose of securing incriminating evidence, we do not find such a situation here. In the *Taylor* case, as this Court pointed out, there was no one in the garage at the time of the officers' entry and consequently their action could not have been for the purpose of making an arrest and an incidental or contemporaneous search. In the instant case the facts were exactly to the contrary. The evidence on the motion to suppress clearly does not support the proposition that the predominant purpose of the officer in entering the garage was to search rather than to arrest. It will be noted that in the *Agnello* case (pp. 30, 32, 33) this Court indicates that there is no distinction between a lawful search being "incident" to or "contemporaneous" with the arrest.

The predominant thought is evidently that the arrest must be the primary objective and the search the subsidiary purpose of the entry on premises in order to justify the search. Which precedes the other is immaterial, so long as the two are part of the same transaction.[12]

Petitioner suggests that the officers might have obtained a warrant to search his automobile, if they believed that they had reasonable and probable cause to do so, after the automobile had been driven into the petitioner's garage. He argues that it would have been a simple matter to have had one of the officers obtain the search warrant while the other officer watched the premises (Br. 21). This contention ignores the fact that the time was shortly after midnight, and that one or more officers would have had to maintain a vigil until a warrant could be secured in the morning. Moreover, even if one of the officers had remained on guard there was no assurance that the car would not have been driven away. There was in the instant case the same impracticability with respect to securing a search warrant as there was in the *Carroll* and *Husty* cases, *supra*.

In considering the validity of the search and seizure the burden was on the petitioner to establish that the evidence was inadmissible and that his motion to suppress should be granted. *Schnitzer* v. *United States*, 77 F. (2d) 233, 235 (C. C. A. 8th); *Distefano* v. *United States*, 58 F. (2d) 963, 964

[12] For example, in *Donahue* v. *United States*, 56 F. (2d), 94 (C. C. A. 9th), the serch preceded the arrest.

(C. C. A. 5th); *United States* v. *Fitzmaurice,* 45 F. (2d) 133, 135 (C. C. A. 2d); *Samson* v. *United States,* 26 F. (2d) 769, 770 (C. C. A. 1st); *United States* v. *Wainer,* 49 F. (2d) 789, 794 (W. D. Pa.); *United States* v. *Vatune,* 292 Fed. 497, 499 (N. D. Cal.).

We submit that under all the facts and circumstances the search and seizure in the instant case were legal and that the motion to suppress was properly overruled.

II

IT WAS NOT ERROR TO SUSTAIN OBJECTIONS TO QUESTIONS SEEKING TO ELICIT FROM GOVERNMENT WITNESSES THE IDENTITY OF THEIR CONFIDENTIAL INFORMER.

At the trial petitioner, on cross-examination of Investigator Williamson, a witness for the Government, inquired whether the latter had received any information which he considered reliable concerning the petitioner's "actions" in Charleston, West Virginia, and whether the witness had at any time received any information concerning the petitioner which he considered reliable information and which later turned out to be unreliable, false and perjurious. This cross-examination was not permitted (R. 29).

He requested Investigator Bowes, another Government witness at the trial, to "tell us the name of your confidential informer." (R. 34.) An ob-

jection by the Government to this question was sustained. The validity of this ruling is now challenged. However, no formal exception was taken at the trial. Nevertheless, without waiving this defect, we shall discuss the subject as though it were properly presented.

In a colloquy with the trial court the petitioner's counsel stated that he proposed to show "by this line of cross-examination that the witness received information which he considered reliable at the former trial by producing two witnesses who testified concerning the movements of the defendant Scher, which testimony later developed by an investigation by the Attorney General of the United States to be false, perjurious and unreliable"[13] (R. 34–35).

Petitioner now contends that "since the search without a warrant in the case at bar was based on information obtained from a 'confidential informer,' that the defendant and the Court were entitled to know the name of that informer and all

[13] The petitioner states in his brief that as the result of this investigation of the Attorney General, the Government confessed error in the Circuit Court of Appeals, upon which confession of error the case was reversed and remanded and the present trial had (Br. 28). It should be pointed out in this connection that there is nothing in the record in the instant case or in the files of this Department which indicates that the information which resulted in the erroneous testimony at the former trial came from the same source as the information which the petitioner now attempts to impugn.

the circumstances, so that the Court could determine whether or not the information was given by a reliable informant." (Br. 31.) Again he states: "It is * * * our contention that the defendant was entitled to know the source of the agent's information so that the court might determine whether or not a case of probable cause had been established" (Br. 30). He urges, in effect, that if the cross-examination had been permitted, the resulting testimony might have cast doubt upon the judgment of the officers in determining the reliability of the confidential information.

The general rule is that for reasons of public policy the sources of confidential information given to Government officers may be kept secret and need not be disclosed. This rule is founded on the right and duty of every citizen to communicate to the executive officers of the Government charged with the duty of enforcing the law any information he may have with respect to violations of the law. The information is therefore regarded as a privileged communication which the courts will not compel or permit to be disclosed without the consent of the Government. *Elrod* v. *Moss*, 278 Fed. 123, 127 (C. C. A. 4th); *Arnstein* v. *United States*, 296 Fed. 946, 950 (App. D. C.), certiorari denied, 264 U. S. 595; *Mitrovich* v. *United States*, 15 F. (2d) 163 (C. C. A. 9th); *Segurola* v. *United States*, 16 F. (2d) 563, 565 (C. C. A. 1st), affirmed on other grounds, 275

U. S. 106; *Goetz* v. *United States,* 39 F. (2d) 903 (C. C. A. 5th); *Shore* v. *United States,* 49 F. (2d) 519, 522 App. D. C.),[14] certiorari denied, 283 U. S. 865; 285 U. S. 552; *McInes* v. *United States,* 62 F. (2d) 180, 181 (C. C. A. 9th), certiorari denied, 288 U. S. 616; *Worthington* v. *Scribner,* 109 Mass. 487, 488–489; *Trial of Thomas Hardy,* 24 State Trials 199, 808; *Marks* v. *Beyfus,* L. R. 25 Q. B. D, 494, 498; Wigmore on Evidence, 2d ed., Vol. 5, Sec. 2374; Underhill's Crim. Ev., 4th ed., Sec. 332. See also *Vogel* v. *Gruaz,* 110 U. S. 311, 315–316 and *In re Quarles and Butler,* 158 U. S. 532, 535–536.

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[14] In *Shore* v. *United States,* cited in the text, Judge Groner stated (pp. 522–523):

> Obviously, the whisky having been legally seized, as we hold, it was proper to retain it as evidence, and the suggestion that an officer receiving confidential information of an alleged violation of the law should be required to disclose the name of his informant has been decided to the contrary. *Vogel* v. *Gruaz,* 110 U. S. 311, 4 S. Ct. 12, 28 L. Ed. 158; *Segurola* v. *U. S.* (C. C. A.), 16 F. (2d) 563, and the cases cited there. But, without regard to this principle, defendants may no more complain of the action of the court in refusing to require this fact to be disclosed than could defendants in the *Segurola* Case, supra, for the information thus obtained by the police furnished only the impulse for the act—the watch and search. The information itself was not used as evidence of guilt, and the fact of guilt itself is really not denied, and, if the uncontradicted evidence of the officers is believed, the defendant Shore intends to persist in his unlawful career. To have required, under these circumstances, that the name of the informant should be disclosed, would merely have gratified his curiosity or his vengeance, whichever was most involved, without affecting in any way the pending question before the court.

In the case of *In re Quarles and Butler, supra,* this Court said (pp. 535–536):

> It is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offence against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and *the disclosure of which cannot be compelled without the assent of the government.* [Italics ours.]

In the *Quarles* case and in *Vogel* v. *Gruaz, supra,* this Court cited *Worthington* v. *Scribner, supra,* in which it was said (pp. 488–489):

> It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against its laws. To encourage him in performing this duty without fear of consequences, the law holds such information to

> be among the secrets of state, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known, to the absolute discretion of the government, to be exercised according to its views of what the interests of the public require. *Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the government.* The evidence is excluded, not for the protection of the witness or of the party in the particular case, but upon general grounds of public policy, because of the confidential nature of such communications. [Italics ours.]

Some cases have recognized an exception to or qualification of this rule and have permitted the disclosure of the identity of the informer or the source of confidential information when such disclosure is necessary either to establish the innocence of a defendant or otherwise to permit the proper disposition of the issues of a particular case. *Trial of Thomas Hardy, supra,* p. 808; *Marks* v. *Beyfus, supra,* p. 498; *Regina* v. *Richardson,* 3 Foster & Fin. N. P. Cases 693; *Humphrey* v. *Archibald,* 20 Ont. App. 267, 270; *United States* v. *Blich,* 45 F. (2d) 627 (Wyo.); *Wilson* v. *United*

States, 59 F. (2d) 390, 392 (C. C. A. 3d); *Centoamore* v. *State*, 105 Neb. 452, 455–456; *United States* v. *Moses*, 4 Wash. C. C. (U. S.) 726, 727; Wigmore on Ev., *supra*, p. 176; Underhill's Crim. Ev., *supra*, p. 634.

In *Marks* v. *Beyfus*, L. R. 25 Q. B. D. 494, Lord Esher enunciated the general principle (p. 498):

> "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person . . . and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." Now, this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should

> be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not. The learned judge was, therefore, perfectly right in the present case in applying the law, and in declining to let the witness answer the questions. The result of his so deciding was, of course, that the plaintiff's cause of action, which was founded on the alleged instigation of the Director of Public Prosecutions by the defendants, failed, for there was no evidence of any such instigation.

Preliminarily, it may be pointed out that, as is apparent from our prior discussion, there is no basis for any inference that the Government is compelled to rely, as the petitioner seems to think, upon the confidential information to sustain the validity of the search and seizure, in view of the petitioner's admissions when questioned by the officer at his garage (see pp. 18–19, *supra*). There is consequently no occasion for the application of the exception, sometimes recognized, to the general rule against disclosing the source of confidential information.

Even if it is assumed, *arguendo*, as the petitioner asserts (Br. 30), that the determination of the source of the officers' prior information had any relevance to the issue of probable cause, it is nevertheless submitted that the court did not err in sustaining the objection to petitioner's question.

In the instant case the petitioner does not contend that the identity of the informer had any bearing on any other issue except that of probable cause for the search and seizure. That issue had, however, been concluded prior to the trial. In *Segurola* v. *United States,* 275 U. S. 106, 111, this Court said that—

> except where there has been no opportunity to present the matter in advance of trial, *Gouled* v. *United States,* 255 U. S. 298, 305; *Amos* v. *United States,* 255 U. S. 313, 316; *Agnello* v. *United States,* 269 U. S. 20, 34, a court, when engaged in trying a criminal case, will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property, which are material and properly offered in evidence, because the court will not in trying a criminal cause permit a collateral issue to be raised as to the source of competent evidence. To pursue it would be to halt in the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. * * *

At the trial the petitioner did not attempt to renew his motion to suppress, and he failed to interpose any objection to the admission of the testimony of the officers as to what they discovered on their search of the automobile on the ground that the

search was illegal, as he might have done[15] (R. 28, 33). It is evident, therefore, that the trial was properly confined to the issue of the guilt or innocence of the petitioner of the offenses charged in the indictment. Petitioner freely admitted that he purchased, transported, and possessed liquor (R. 48), which the evidence clearly showed was non-tax paid (R. 49–50, 52), and attempted to show that he did not know that the liquor was tax-unpaid and that it was not intended for sale but for private purposes (R. 37–40, 41–47, 48–49, 55), with a view apparently to bringing his case within the exception contained in the Liquor Taxing statute, and the case went to the jury on these defenses (R. 52, 55). It must be apparent that the identity of the informer could have had no possible bearing on these issues. In fact, the petitioner does not contend that it did. Since it is clear that the disclosure of the identity of the informer was not necessary to the disposition of any of the issues involved at the trial, there was no occasion for applying the exception, sometimes recognized, to the

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[15] In *Cogen* v. *United States*, 278 U. S. 221, 224, this Court said:

> It is not true that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence. If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained. * * *

general rule above discussed. Cf. *Segurola* v. *United States, supra; Shore* v. *United States,* 49 F. (2d) 519, 523 (App. D. C.).

As there was no attempt to elicit a disclosure of the identity of the confidential informer at the hearing on the motion to suppress, it seems unnecessary to discuss the situation which might have arisen if such an endeavor had been made.

The petitioner suggests, in passing, that the trial court erred in permitting the Government witness Williamson to testify "that he had received reliable information from the confidential informer" (Br. 30–31, see R. 29, *supra*). We can best answer the suggestion in the language of Judge Groner in *Shore* v. *United States,* 49 F. (2d) 519, 523, *supra,* in disposing of a similar contention: "The information thus obtained by the police furnished only the impulse for the act—the watch and search. The information itself was not used as evidence of guilt." Moreover, this question was not raised by the assignment of errors contained in the petition for writ of certiorari (pp. 7–9).

Petitioner further complains of the failure of the trial court to grant his motion for a new trial (R. 12–13). The disposition of the motion for a new trial was a matter within the sound discretion of the court. The order on such motion is not appealable. *Holmgren* v. *United States,* 217 U. S. 509, 521; *Ayers* v. *Watson,* 137 U. S. 584, 597; *Kerr* v. *Clampitt,* 95 U. S. 188, 189.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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OCTOBER, 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

No. 49.—October Term, 1938.

Hyman Scher, Alias William Scher, Petitioner, *vs.* The United States.	Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[December 5, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Petitioner Scher was found guilty under two counts of an indictment which charged violations of section 201 Title II Liquor Taxing Act, January 11, 1934[1] by possessing and transporting distilled spirits in containers wanting requisite revenue stamps. He was sentenced for a year and a day, etc. The Circuit Court of Appeals affirmed the judgment.

No objection to the judge's charge is urged and the evidence submitted to the jury is adequate to support the verdict.

The material facts are not in serious dispute. A brief summation will suffice for the points to be considered.

Federal officers received confidential information thought to be reliable that about midnight, December 30, 1935, a Dodge automobile with specified license plate would transport "phony" whiskey from a specified dwelling in Cleveland, Ohio. About nine-thirty officers posted nearby saw the described automobile stop in front of the house and remain there for an hour. A man with three women and a package then entered the car and drove away

[1] Ch. 1, sec. 201, 48 Stat. 313, 316 (U. S. C., Title 26, Sec. 1152a, 1152g)—

"No person shall . . . transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. The provisions of this title shall not apply to—

"(f) Distilled spirits not intended for sale or for use in the manufacture or production of any article intended for sale; . . . ."

Sec. 207—"Any person who violates any provision of this title . . . shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both."

It returned shortly before midnight, stopped at the rear of the house and remained for half an hour. The headlights were extinguished; the officers heard what seemed to be heavy paper packages passing over wood. Doors slammed; petitioner drove the car away, apparently heavily loaded. The officers followed in another car. After going a few blocks petitioner stopped briefly at a filling station; then he drove towards his own residence two or three blocks further along. The officers followed. He turned into a garage a few feet back of his residence and within the curtilage. One of the pursuing officers left their car and followed. As petitioner was getting out of his car this officer approached, announced his official character, and stated he was informed that the car was hauling bootleg liquor. Petitioner replied, "just a little for a party." Asked whether the liquor was tax paid, he replied that it was Canadian whiskey; also, he said it was in the trunk at the rear of the car. The officer opened the trunk and found eighty-eight bottles of distilled spirits in unstamped containers. He arrested petitioner and seized both car and liquor. The officer had no search warrant.

At the trial counsel undertook to question the arresting officers relative to the source of the information which led them to observe petitioner's actions. Objections to these questions were sustained and this is now assigned as error.

Before trial petitioner's counsel moved "to suppress all of the evidence obtained by the search made by the Revenue agents in the above entitled cause, together with all information obtained by reason of such search, and to grant an order requiring the agents to return all articles seized by reason of said search . . . ." In support of this he relied upon the facts above stated. Denial of this motion is said to be error.

The exception in respect of transporting liquor not intended for sale found in the statute affords matter for affirmative defense. *Queen* v. *United States*, 77 F. (2d) 780.

In the circumstances the source of the information which caused him to be observed was unimportant to petitioner's defense. The legality of the officers' action does not depend upon the credibility of something told but upon what they saw and heard—what took place in their presence. Justification is not sought because of honest belief based upon credible information as in *United States* v. *Blich*, 45 F. (2d) 627.

Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense as for example where this turns upon an officer's good faith. *Segurola* v. *United States*, 16 F. (2d) 563, 565; *Shore* v. *United States*, 49 F. (2d) 519, 522; *McInes* v. *United States*, 62 F. (2d) 180.

Considering the doctrine of *Carroll, et al.* v. *United States*, 267 U. S. 132 (See *Husty* v. *United States*, 282 U. S. 694), and the application of this to the facts there disclosed, it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.

Passage of the car into the open garage closely followed by the observing officer did not destroy this right. No search was made of the garage. Examination of the automobile accompanied an arrest, without objection and upon admission of probable guilt. The officers did nothing either unreasonable or oppressive. *Agnello* v. *United States*, 269 U. S. 20, 30; *Wisniewski* v. *United States*, 47 F. (2d) 825, 826.

The challenged judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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